86-1445

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

FIRST TEAM AUCTION, INC.,
Petitioner,

v.

FIRST STATE BANK OF CLAY COUNTY
(FORMERLY FIRST STATE BANK OF
LINEVILLE),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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5 pp

QUESTION PRESENTED FOR REVIEW

Whether the courts below exceeded their jurisdiction and statutory authority when they resolved disputed and genuine issues of material fact in favor of the respondent-movant on a motion for summary judgment.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

First Team Auction, the Petitioner herein Ellis, Easterlin, Peagler & Gatewood, P.C. Ben F. Easterlin IV, attorney for Petitioner Larry Morris, attorney for Petitioner Thomas Reuben Bell, attorney for Respondent James J. Odom, Jr., attorney for Respondent

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Fed. R. Civ. P. 56 . . . . . .

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

FIRST TEAM AUCTION, INC.,
Petitioner,

v.

FIRST STATE BANK OF CLAY COUNTY
(FORMERLY FIRST STATE BANK OF
LINEVILLE),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, FIRST TEAM AUCTION, INC., prays that a writ of certiorari issue to review the December 10, 1986 judgment of the United States

Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, First Team Auction v. First State Bank of Lineville, 808 F.2d 60 (11th Cir. 1986), is a per curiam affirmation of the district court opinion. A copy of the order of the Court of Appeals is attached hereto as Appendix A. The opinion and order of the district court, First Team Auction v. First State Bank of Clay County, No. CV85-H-2383-E (N.D. Ala. Apr. 24, 1986) is attached hereto as Appendix B.

JURISDICTION

The judgment of the district court in favor of Respondent was entered April 24, 1986. The Court of Appeals affirmed the district court's judgment, per curiam, on December 10, 1986. The

jurisdiction of this court is involved pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VII provides, in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 56(c) provides, in pertinent part:

> **Motion and proceedings thereon**
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(e) provides, in pertinent part:

> **Form of affidavits; further testimony; defense required**
>
> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Ala. Code § 6-2-3 (1975) provided, in pertinent part:

Accrual of claim--Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year within which to prosecute his action. (Code 1852, § 2492; Code 1867, § 2916; Code 1876, § 3242; Code 1886, § 2630; Code 1896, § 2813; Code 1907, § 4852; Code 1923, § 8966; Code 1940, T.7, § 42.)

Ala. Code § 6-2-3 (Supp. 1986) provides, in pertinent part:

Accrual of claim--Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within

> which to prosecute his action. (Code 1852, § 2492; Code 1867, § 2916; Code 1876, § 3242; Code 1886, § 2630; Code 1896, § 2813; Code 1907, § 4852; Code 1923, § 8966; Code 1940, T. 7, § 42; Acts 1984, 2nd Ex. Sess., No. 85-39, p. 40, § 2.)

Ala. Code § 6-2-39(a)(5) (1975) (repealed) provided, in pertinent part:

> (a) The following must be commenced within one year:
>
> . . . .
>
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section[.]

Ala. Code § 6-2-38(l) (Supp. 1986) provides, in pertinent part:

> (l) All actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years.

STATEMENT OF THE CASE

On September 6, 1985, Petitioner filed a complaint in the United States District Court for

the Northern District of Alabama alleging that in July 1983, Appellee fraudulently misrepresented the value of certain real property securing a note sold at that time to Petitioner by Respondent. Jurisdiction was founded on diversity of citizenship and jurisdictional amount in controversy. 28 U.S.C. § 1332. Respondent defended on the grounds, inter alia, that the complaint was barred by the Alabama statute of limitations. Subsequently, Respondent filed a motion for summary judgment on the grounds that Petitioner knew, or should have known, of any fraud as of January 9, 1984, and that Petitioner's complaint was violative of the Alabama one-year statute of limitations for fraud claims. The district court granted summary judgment to Respondent, and the court of appeals subsequently affirmed, per curiam, the district court's judgment.

FACTS:

First Team Auction, Inc. [hereinafter "Petitioner"] is an auction company located in Americus, Georgia and is in the business of conducting consignment auctions of farm equipment, construction equipment, livestock and real estate. R1-11-2.[1] Prior to July 1983, Petitioner operated almost exclusively in the State of Georgia and had never sold any real property in Alabama. R1-14-6. In the spring of 1983, Petitioner began negotiating with Madison H. Hooton, Sr., Marion P. Hooton, Madison H. Hooton, Jr., and Marion E. Hooton d/b/a The Hooton Company ("Hooton") to sell approximately three thousand acres of timberland ("the timberland") owned by Hooton in Randolph, Clay, and Tallapoosa

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[1]References are, unless otherwise noted, to the record as it was labelled in the Court of Appeals.

Counties, Alabama. At the time, Hooton was primarily engaged in the production and sale of chickens and eggs and had accumulated large indebtedness to certain lenders and to certain suppliers of chickens, feed and other similar items. These creditors ("the lienholders") had secured Hooton's indebtedness to them through mortgages and judgments on the timberland. Hooton expressed to Petitioner a desire to sell some of the timberland in order to reduce his total indebtedness. In early or middle June 1983, Hooton and Petitioner agreed that Petitioner would auction the timberland in July 1983. R1-11-2. At the same time, Hooton and Petitioner executed a second contract whereby Petitioner was to auction other property of Hooton in the spring of 1984. This property was residential and recreational development property on a lake (the "lakefront property"), and it was

mortgaged to the First State Bank of Lineville ("Respondent"). R1-11-3. Respondent agreed to release its mortgage to facilitate the spring 1984 auction. R1-11-3, 4. R1-11-2.

On or about July 5, 1983, Ken Vaughn, President of Respondent bank, informed Petitioner that, despite its earlier agreement to release its lien on the lakefront property in the spring of 1984, that foreclosure of Respondent's mortgage on the lakefront property was now imminent. Hooton, Petitioner and Respondent then entered into negotiations to forestall the foreclosure. R1-11-4. During these negotiations Respondent showed Petitioner an MAI[2] appraisal representing the fair market value of the lakefront property to be in excess of one million

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[2]"Member Appraisal Institute" denotes an organization for real estate appraisers of the highest standards.

dollars. Respondent emphasized that this was a MAI appraisal and that the appraisal was therefore totally reliable as an indication of the value of the property. R1-11-5. Concerned that Respondent's threatened foreclosure of Hooton's lakefront property would chill the sale of the timberland in the July 1983 auction, Petitioner purchased the Hooton mortgage to Respondent. R-11-6, 7.

In purchasing this mortgage, Petitioner did not have time to make an independent determination of the value of the lakefront property and relied entirely on the MAI appraisal and the representations of Respondent. On July 23, 1983 First Team conducted the auction of the timberland, but shortly thereafter Hooton filed a Chapter 11 petition in the United States Bankruptcy Court, nullifying all sales at this auction.

In August 1984, Appellant was finally able

to obtain a release of both the timberland and the lakefront properties from the Bankruptcy Court and sell them at auction. The lakefront property sold for considerably less than the value represented to Petitioner by Respondent, and Petitioner did not recover the sum it paid to Respondent to purchase the mortgage on this property. This was Petitioner's first indication or knowledge that the lakefront property was worth less than the value represented by Respondent in July 1983. R1-11-9, 10. In May of 1985, Hooton told Petitioner that Respondent knew in July 1983 that the MAI appraisal of the lakefront property overstated its value and the Respondent tricked Petitioner into purchasing this mortgage in order to transfer the potential loss on Hooton's debt to Petitioner. R1-11-11. This was Appellant's first knowledge of Appellee's fraudulent misrepresentation of the value of the lakefront

property. R1-11-11.

The parties and the trial judge below were all in agreement that January 9, 1984 was the critical date for determining whether or not Petitioner's fraud cause of action was time-barred. When the contract for sale of the mortgage was entered into in July 1983, the Alabama statute of limitations for action based on fraud was one year. Ala. Code § 6-2-39(a)(5) (1975) (repealed by Act No. 85-39, 1984-85 Ala. Acts (2nd Special Sess. 40). As of January 9, 1985, fraud claims are governed by the two-year statute of limitations of Ala. Code § 6-2-38(l) (Supp. 1986). Because of the Alabama fraudulent concealment statute, Ala. Code § 6-2-3 (1975 & Supp. 1986), a cause of action for fraud is tolled until the fraud either is discovered, or should have been discovered.

Again, the parties agreed that, if

Petitioner did not, utilizing due diligence, discover the fraud perpetrated by the Respondent before January 9, 1984, Petitioner would gain the benefit of the new two-year provision of both Ala. Code §§ 6-2-38(1) and 6-2-3, and the cause of action would not be time-barred. See Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 268-69 (Ala. 1981) (limitations period may be extended by legislature retroactively as long as claim not already time-barred when legislature acts). Cf. Bajalia v. Jim Magill Chevrolet, Inc., 497 So. 2d 489, 491 (Ala. 1986) (cause of action for fraud filed after expiration of one-year period following discovery of fraud not revived by subsequent amendment of Ala. Code § 6-2-39 (Supp. 1986)). The critical issue, therefore, is whether the district court, and court of appeals properly concluded that, as a matter of law, Petitioner should have discovered the fraud

of Respondent prior to January 9, 1984.

REASONS FOR GRANTING CERTIORARI

In reaching its per curiam decision affirming the judgment of the district court granting the Respondent summary judgment, the court of appeals has decided a question of federal law in conflict with past decisions of this Court and other courts of appeals; furthermore, the court below "has so far departed from the accepted and usual course of proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a).

It has always been clear that Fed. R. Civ. P. 56, which governs the procedure of summary judgment, may not sanction a violation of U.S. Const. amend VII: i.e., a trial judge may not, under the guise of a summary judgment motion,

"cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) (finding summary judgment inappropriate where it invaded province of the jury). Therefore, in order to ensure that a litigant's right to trial is not violated, Fed. R. Civ. P. 56 must be interpreted to foreclose summary judgment where there do exist disputed issues material to the resolution of the case. Furthermore, even if the nonmoving party will bear the ultimate burden of persuasion at trial with respect to an issue, summary judgment is only appropriate in the absence of a conflict in the materials considered on the motion. Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In deciding whether there is a genuine issue of material fact, the court must view the evidence presented in the light most

favorable to the nonmoving party and resolve all conflicts in favor of that side. Id. This is precisely what the courts below failed to do. This is not a case such as Celotex, in which the nonmoving party introduced no summary judgment evidence in support of the position it bore the burden to establish at trial. Here, the allegations of Respondent--that the Petitioner should have discovered the fraud prior to January 9, 1984--were rebutted by the affidavits submitted to the court by Carlus D. Gay, Jr., the President of First Team Auction, the Petitioner (excerpts from which are attached hereto as Appendices C and D).

The key to the controversy is contained in the meaning of Ala. Code § 6-2-3 (1975 & Supp. 1986). This is a fraudulent concealment statute, but it is clear that it operates in the same manner as a "discovery rule" when the underlying

basis of the cause of action is fraud itself:

> Under § 6-2-3, Code 1975, an action for fraud must be brought within one year from the discovery of the fraud. The statute of limittions will not begin to run until the plaintiff knows of facts which would have put a reasonable mind on notice of the possible existence of fraud.
>
> Facts showing a fraud are considered to be discovered when they should have been discovered by one who has acquired knowledge sufficient to provoke inquiry in the mind of a person of ordinary prudence. Butler v. Guaranty Savings & Loan Ass'n, 251 Ala. 449, 37 So.2d 638 (1948). One who is being deceived, however, may be lulled into a false sense of security. Consequently, "[a] party thus situated is not required to presume fraud or suspect it, until something comes to him leading a just person to suspect and make inquiry." Williams v. Bedenbaugh, 215 Ala. 200, 110 So. 286 (1926).

Earle, McMillan & Niemeyer, Inc. v. Dekle, 418 So. 2d 97, 99-100 (Ala. 1982) (emphasis added) (holding that purchasers of real property who alleged fraudulent misrepresentations of

brokerage firm and real estate salesman fell within fraudulent concealment exception where there was no reason for plaintiffs to have questioned representations). While it is true that the ultimate burden of persuasion at trial regarding the tolling of the statute is upon the plaintiff relying on the exception, Amason v. First State Bank of Lineville, 369 So. 2d 547, 550-51 (Ala. 1979), the question of whether plaintiffs should have discovered the fraud in question within a certain time is one for the jury when plaintiff's evidence is "sufficient to raise a reasonable inference in support of their position that they did not discover a condition which put them on notice of possible fraud[.]" Elrod v. Ford, 489 So. 2d 534, 537 (Ala. 1986). Furthermore, whether the Petitioners in the case sub judice exercised due diligence in discovering the fraud must be analyzed in the following

statement of the law in Alabama:

> Broadly speaking, the facts constituting the fraud are to be considered as discovered when they ought to be discovered, when such facts come to knowledge as provoke inquiry in a person of ordinary prudence, and which, if followed up, would lead to the discovery of the fraud. But this rule is not to be so applied as to defeat the ends of the statute. Fraud, in the nature of it, implies that the party has been misled and that, by the wrong of another, he is accepting and resting in a false sense of security. A party thus situated is not required to presume fraud or suspect it, until something comes to him leading a just person to suspect and make inquiry.
>
> Dealing with the case before us, only a period of some four months elapsed from the time of the purchase of the stock until the twelve months' period provided by the saving clause of the statute began. This is not per se an unreasonable time for the discovery of the fraud or such time as calls for explanation of long acquiescence and delay. In such case, we think the rule stated in Maxwell v. Lauderdale, supra, quite strict enough; viz., the replication should show how and when the facts constituting the fraud became known, with a general denial of the knowledge of such facts theretofore.

Williams v. Bedenbaugh, 215 Ala. 200, 110 So. 286, 289 (1926) (emphasis added).

The district court, in holding that Respondent was entitled to summary judgment, does not even refer to the affidavits of Petitioner's president filed in opposition to summary judgment [Appendices C-D]. The district court in essence held that Petitioner should have discovered the fraud prior to January 9, 1984 because: (1) an agent of the Petitioner purchased certain lakefront property in July 1983 that should have put Petitioner on notice of the fraud (Appendix B-6); (2) Petitioner is a "sophisticated corporation with considerable experience in the purchase, sale and development of real estate," (Appendix B-7); and (3) Petitioner had its representatives on the land involved by July 1983 (Appendix B-7). The court concluded that Petitioner should have attempted to discover the

fraud before 1984. However, it is clear that under Alabama substantive law which the district court was constitutionally bound to apply in this diversity case, Erie Railroad v. Tompkins, 304 U.S. 64 (1938); that the Petitioner was under no absolute duty to investigate possible fraud where there was no indication, until well into 1984, that any fraud existed. Earle, McMillan & Niemeyer, Inc. v. Dekle, supra; Williams v. Bedenbaugh, supra. Furthermore, on most of the "facts" found by the district court in reaching its conclusion, the court was just plain wrong, as demonstrated by the affidavits by Petitioner's president. For example, Petitioner denied that any lakefront property was sold in July 1983 (Appendix C-1). Thus, Petitioner, contrary to the finding of the court, did not have constructive knowledge that the lakefront property would sell for less than the appraisal. Second,

Petitioner denied that it had any experience in the sale of lakefront property, and did not have "considerable experience in the purchase, sale and development of real estate" (Appendix B-7; C-2). Finally, Petitioner denied that any of its representatives inspected the lakefront property until the spring of 1984; a fact which Respondent was aware of (Appendix D-1-3; C-2-3).

Thus, all of the basis of the district court's decision were the subject of hotly-disputed issues. By resolving the disputes in favor of the moving party the district court, and the court of appeals in affirming the trial court's decision, violated the meaning and spirit of Fed. R. Civ. P. 56.

Other circuit courts of appeals, in considering whether summary judgment was appropriate when the nonmoving party claimed that the injury was not discoverable before a particular point in

time, have disagreed with the analysis of the district court in this case. For example, in Braxton-Secret v. A.H. Robins Co., 769 F.2d 528 (9th Cir. 1985), it is stated that questions involving a person's state of mind are generally factual issues inappropriate for summary judgment, and such judgment should not be granted where contradictory inferences can be drawn from even undisputed facts. Id. at 531 (concluding that plaintiff's fraudulent concealment defense did not preclude summary judgment where plaintiff gained actual independent knowledge of the wrong dispute concealment); see also Allen v. A.H. Robins Co., 752 F.2d 1365 (9th Cir. 1985) (reversing summary judgment in favor of manufacturer to permit plaintiff to set up fraudulent concealment defenses); Lundy v. Union Carbide, 695 F.2d 394 (9th Cir. 1982) (trial court's grant of summary judgment improper where there existed fac-

tual dispute as to whether plaintiff should have discovered medical injury prior to a particular date); Admiralty Fund v. Jones, 677 F.2d 1289 (9th Cir. 1982) (it was not clearly shown in securities fraud action that buyer was put on notice of defendant's alleged misrepresentations regarding corporate shares; thus, plaintiff's due diligence, or lack thereof, was substantial issue of material fact, precluding summary judgment).

Other circuits are in accord. The Fifth Circuit, prior to the split-off and creation of the Eleventh Circuit, held in In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1170 (5th 1979), cert. denied, 449 U.S. 905 (1980), that the question of when the statute of limitations began to run in the face of a claim of fraudulent concealment "is a factual one, . . . and is therefore not determinable on a motion for summary judgment" (citation omitted).

With respect to the Court of Appeals, District of Columbia Circuit, see Hartford Life Insurance Co. v. Title Guarantee Co., 520 F.2d 1170 (D.C. Cir. 1975) (reversing summary judgment where issue of whether plaintiff should have learned of fraudulent conduct earlier than it did was not established as a matter of law); Emmet v. Eastern Dispensary & Casualty Hospital, 396 F.2d 931 (D.C. Cir. 1967) (genuine issue of fact remained as to plaintiff's fraudulent concealment claim barring summary judgment). The Second Circuit is in agreement, Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) (summary judgment erroneously granted where conflicting inferences could be drawn from affidavits as to whether plaintiff exercised due diligence in discovering cause of action).

In the Seventh Circuit, see Sperry v. Barggren, 523 F.2d 708 (7th Cir. 1975) (whether

alleged fraud was concealed or was of such a nature as to conceal itself, thus tolling statute of limitations, could not be resolved on summary judgment because of questions of fact); Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) (evidence of fraudulent concealment raised factual issue, precluding summary judgment). See also Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977) (material fact existed as to whether claimant should have discovered condition before he did, precluding summary judgment).

The Eleventh Circuit cases cited by the district court below are clearly distinguishable. In Sewers v. A.H. Robins Co., 715 F.2d 1559 (11th Cir. 1983), the plaintiff claimant's cause of action was products liability--not fraud. Thus, she was required, under Alabama law, to allege and plead the acts constituting fraudulent concealment on the part of the defendant manufac-

turer. This, like the plaintiff in Celotex Corp. v. Catrett, supra, she wholly failed to do. There were thus no disputed issues as to when she should have discovered the fraud, since she had not alleged any fraud at all. 715 F.2d at 1561-62. The fraud in the case sub judice lies in the underlying cause of action; no party has suggested that the facts constituting that cause of action have not been alleged.

Furthermore, Hunt v. American Bank & Trust Co. of Baton Rouge, 783 F.2d 1011 (11th Cir. 1986) is likewise not controlling here. In that case, the original receiver had already determined, outside the limitations period, facts indicating that certain transactions were fraudulent, or suspected them to be so. In the present case, Petitioner has submitted competent summary judgment evidence that there were no such suspicions until the spring of 1984. Because of

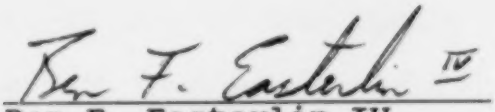
the high reputation for accuracy attributed to MAI appraisals, Petitioner had no reason to look for fraud where none appeared on the face of the transaction, and had no duty to do so under Alabama law. Earle, McMillan & Niemeyer, Inc. v. Dekle, supra, 418 So. 2d at 100.

In sanctioning per curiam the actions of the district court, it is submitted that the court of appeals has acted inconsistently with the decisions of this Court and other circuit courts of appeals. Thus, Petitioner requests that this Court exercise its supervisory authority and reverse the court of appeals.

CONCLUSION

Wherefore, Premises Considered, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this date served three (3) copies each of the foregoing Petition for Writ of Certiorari upon the First State Bank of Clay County (formerly State Bank of Lineville), by mailing true and correct copies of the same correctly addressed, and with sufficient postage affixed thereto, to the following counsel:

Thomas Reuben Bell
223 North Norton Avenue
Sylacauga, Alabama 35150

James J. Odom, Jr.
P.O. Box 11244
Birmingham, Alabama 35202-1244

This 6th day of March, 1987.

Ben F. Easterlin IV

Ben F. Easterlin IV
Attorney for Petitioner

APPENDIX A

The opinion of the Court of Appeals:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-7371

FIRST TEAM AUCTION, Etc., DO NOT PUBLISH

Plaintiff-Appellant,

versus

FIRST STATE BANK OF
LINEVILLE, etc.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX B

The opinion of the district court:

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

FIRST TEAM AUCTION, INC.,	)	
PLAINTIFF,	)	
VS.	)	CV85-H-2383-E
FIRST STATE BANK OF CLAY COUNTY,	)	
DEFENDANT.	)	

MEMORANDUM OF DECISION

This cause is before the court on the motion of defendant for summary judgment in its favor on the complaint. The factual background of this case is presented in the court's order entered January 3, 1986, and will not be reiterated in detail here.

This action arises out of a transaction between plaintiff and defendant culminating in an agreement executed July 21, 1983. On September 6, 1985, plaintiff filed this suit, claiming to have been defrauded by defendant in the July 1983 transaction. Defendant's main asserted ground for summary judgment is that plaintiff's claim herein is time barred.

Three Alabama statutes are relevant here. Before 1985, fraud claims in Alabama were governed by the one-year statute of limitations in Ala. Code §6-2-39(a)(5) (1975) (repealed by Act No.85-39, 1984-85 Ala. Acts (2nd Special Sess.) 40). Effective January 9, 1985, such claims fall under the two-year statute prescribed by Ala. Code §6-2-38(1) (Supp. 1985). The final statute that is critical here is Ala. Code §6-2-3 (1975 and Supp. 1985), which tolls the statute of limitations on a fraud claim until such time as

the plaintiff should with reasonable diligence have discovered the fraud. (Before January 9, 1985, a party plaintiff had one year from the date the fraud should have been discovered to bring suit. Act No. 85-39, supra, extended that time to two years, effective January 9, 1985).

The parties are in agreement that plaintiff gains the benefit of the two-year statute if it could not with reasonable diligence have discovered its fraud claim before January 9, 1984. See Tyson v. Johns-Manville Sales Corp., 399 So. 2d 263, 268-69 (Ala. 1981) (legislature may extend limitations period for existing claim, so long as claim was not already time barred at the time of the legislative action). Thus, the crucial inquiry here is whether plaintiff's alleged fraud claim arose before January 9, 1984. If it arose before that date, it would have been time barred under §6-2-39(a)(5) well before this suit

was filed. If it arose on or after that date, plaintiff gained the benefit of §6-2-38(1) and the amended §6-2-3 and obtained an extra year in which to file suit.

As an initial proposition, it must be noted that, but for §6-2-3, plaintiff's claim would have arisen in July 1983, the time of the alleged fraud, and thus would have been time barred over a year before this suit was filed. The burden is on plaintiff to show that it should not have discovered defendant's alleged fraud until such time as to make the filing of suit timely under §6-2-3. See Amason v. First State Bank, 369 So. 2d 547, 550 (Ala. 1979). In order to prove the applicability of § 6-2-3, plaintiff must show not merely that it was ignorant of the facts underlying the alleged fraud, but rather that its ignorance was "superinduced by the fraud of the [defendant] in the form of active concealment,

conduct calculated to mislead, or to prevent inquiry and lull into repose." Peters Mineral Land Co. v. Hooper, 208 Ala. 324, 329, 94 So. 606 (1922). Of course, the statute begins to run notwithstanding §6-2-3 from the time the alleged fraud should have been discovered, not from the time of actual discovery. Johnson v. Shenandoah Life Insurance Co., 291 Ala. 389, 397, 281 So. 2d 636 (1973).

Here, the undisputed facts show that plaintiff bought mortgages from defendant in July 1983. It planned to sell the lands covered by those mortgages (the "mortgaged lands") in the spring of 1984, after selling other lands owned by the mortgagor in July 1983. The auction of the bulk of the mortgaged lands actually took place in August 1984, after a lawsuit wherein defendant here sought and obtained specific performance of plaintiff's agreement to buy the

mortgages, which lawsuit was resolved in December 1983, and after protracted negotiations in the Bankruptcy Court for this district over the release of the mortgaged lands from the estate of the bankrupt mortgagor. At the August 1984 auction, the mortgaged lands brought in an amount considerably less than their appraised value under the appraisal plaintiff now says was fraudulent.

Further, it appears that plaintiff had sold some 40 acres of the mortgaged lands as part of Tract R-4 in the July 1983 auction. This tract, along with other tracts adjoining some of the mortgaged lands, sold at auction for $350 per acre, again apparently less than the appraised value on which plaintiff purportedly relied. The purchaser of Tract R-4 was, in fact, the agent of plaintiff.

To judge from its financial statements and

its activities, as reflected by the court record, plaintiff is a sophisticated corporation with considerable experience in the purchase, sale and development of real estate. Plaintiff had had its representatives on the mortgaged lands by July 1983, at least to the extent necessary to include photographs and information on the mortgaged lands in promotional materials for the July 1983 auction and to sell (and indirectly purchase) Tract R-4 in the July 1983 auction. Plaintiff was engaged in litigation over its contract to buy the mortgages throughout the fall of 1983. Nonetheless, plaintiff says it could not have discovered the alleged fraud in 1983, nor even after the August 1984 auction. Rather, it maintains that it discovered the alleged fraud only after contact with the mortgagor in May 1985.

This argument will not hold water. Of

course, it is only important whether plaintiff should have discovered the alleged fraud before January 9, 1984, not whether its actual discovery did not occur before May 1985. On this point, the court must reiterate that plaintiff is a sophisticated corporation claiming to have been defrauded in a transaction of the kind in which it regularly engages, not a naive individual of whom an overbearing entity has taken advantage.

While disputes as to when a party plaintiff should have known of a fraud may ordinarily be left to the jury, it is clear that in some circumstances there may be no genuine dispute in light of the identities and activities of the parties, so that the matter may be resolved in a defendant's favor without trial. See, e.g., Hunt v. American Bank & Trust Co., 783 F.2d 1011, 1014 (11th Cir. 1986). Further, it is settled that §6-2-3 does not relieve a party plaintiff of

diligence in the discovery of fraud, but rather that it requires that fraudulent concealment of the existence of the fraud be plead and proven. Sellers v. A.H. Robins Co., 715 F.2d 1559, 1561-62 (11th Cir. 1983).

The present case appears to be squarely within the rule of Taylor v. South & North Alabama Railroad Co., 13 F. 152, 159 (C.C.M.D.Ala. 1882), holding that a predecessor statute to §6-2-3

> . . . certainly does not absolve a party from all effort or diligence to obtain knowledge of the facts constituting the fraud complained of. The statute certainly was not intended [to] and did not change the rule of equity upon the subject of diligence in such cases, and thus benefit those only who might be willfully ignorant, or who, from carelessness and indifference, should neglect to avail themselves of the means of information on the subject.
>
> * * *
>
> . . . There must, then, be some dis-

> position and effort to obtain a knowledge of the facts, and that is what the law calls reasonable diligence. The question is not what facts the complainant actually knew, but of what facts might he have obtained knowledge had he sought it from the natural sources of information which were at his command.

Here, plaintiff was experienced in real estate matters. For the latter half of 1983 it was engaged in negotiations and litigation regarding the mortgaged land. The mortgaged land was in its control from July 1983 on, and in July 1983 it auctioned off and bought for its own account 40 acres of the mortgaged land. Plaintiff had ample access to information it needed to discover the alleged fraud, and ample time and reason to use that information. Its failure to do so shows that it lacked the diligence required to claim the benefit of §6-2-3.

On this record, it is apparent as a matter of law that plaintiff should have known of defen-

dant's alleged fraud before January 9, 1984, and thus that this action became time barred before January 19, 1985. Accordingly, defendant's motion for summary judgment in its favor will be granted, and a separate order dismissing the complaint with prejudice will be entered.

DONE this 24th day of April, 1986.

UNITED STATES DISTRICT JUDGE

APPENDIX C

Excerpts from affidavit submitted by Carlus D. Gay, Jr., Petitioner's President, dated November 4, 1985:

"Upon obtaining the agreement of Hooton's suppliers and lenders to allow an auction of Hooton's timberland without reserve, Hooton and First Team entered into an auction contract for sale of approximately 3,000 acres, none of which was included in the mortgage of First State Bank of Lineville, in July, 1983 and a second auction, consisting of property included in the mortgage to First State Bank of Lineville in the spring of 1984. . . ." (emphasis added) R1-11-4.

"This property was significantly different in character from the approximately 3,000 acres of

Hooton timberland which was to be sold in the July, 1983 auction. None of that property was lake front property, and it was scattered tracts of hillside timberland. In contrast, the property on which First State Bank of Lineville held a mortgage was subdivision development type property around the lake." R1-11-6.

"First Team Auction had never sold any water front property in Alabama at that time, and in fact, to the best of my knowledge and recollection had not sold any real property in Alabama before the Hooton auction" R1-11-6.
At the time of these negotiations, First Team had not had the opportunity to cruise, appraise or thoroughly inspect the property to determine its value; but First Team had seen most of the property. Nothing about the appearance of the water front property indicated that it was of any

less value than specified in the aforementioned appraisal. Actually, the water front property looked to be attractive subdivision development property and only someone familiar with values and comparable sales in that particular area would have had any reason to know that this property was not worth as much as indicated in the appraisal." R1-11-6.

APPENDIX D

Excerpts from affidavit of Carlus D. Gay, Jr., Petitioner's President, dated February 14, 1986:

". . . Hooton drove the First Team representative around to see as much of the 3,000 acres of timberland as possible. During this cursory inspection, Hooton also pointed out some of the lake front property. However, Hooton did not show the First Team representative all of the lake front property, and none of the lake front property was inspected closely at this time as Hooton and the First Team representative had too much territory to cover in a few hours. R1-14-2.

. . . Furthermore, no representative of First Team spent any time at all before the July 23,

1983 auction on or inspecting the lake front property which was to be the subject of a later auction. Also, because of its involvement with the upcoming July 23, 1983 auction, First Team had no opportunity and did not visit or inspect the lake front property from July 5, 1983, the time it began its negotiations with First State Bank of Lineville regarding the purchase of the Hooton mortgage on such property, until the July 23, 1983 auction. As a result, First Team had to and did, rely entirely upon the representatives by the bank as to the value of the lake front property during these negotiations. R1-14-3.

. . . and no representative of First Team had any involvement with or performed any inspection of the lake front property in any way between July 23, 1983 and the spring of 1984. R1-14-4.

In the spring of 1984, First Team began for the first time to plan for an auction of the lake front property, and First Team representatives saw all of the lake front property for the first time. Prior to spring 1984, no First Team personnel had thoroughly inspected the lake front property at all, and the only contact with such properties was one or two occasions when a First Team representative saw some of the tracts while preparing for the July, 1983 auction. Even though plans for the lake front auction began in the spring of 1984, no actual work on the property was undertaken until July due to the lack of the Bankruptcy Court's approval of the sale until that time. R1-14-4.

No. 86-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FIRST TEAM AUCTION, INC.,
Petitioner

v.

FIRST STATE BANK OF CLAY COUNTY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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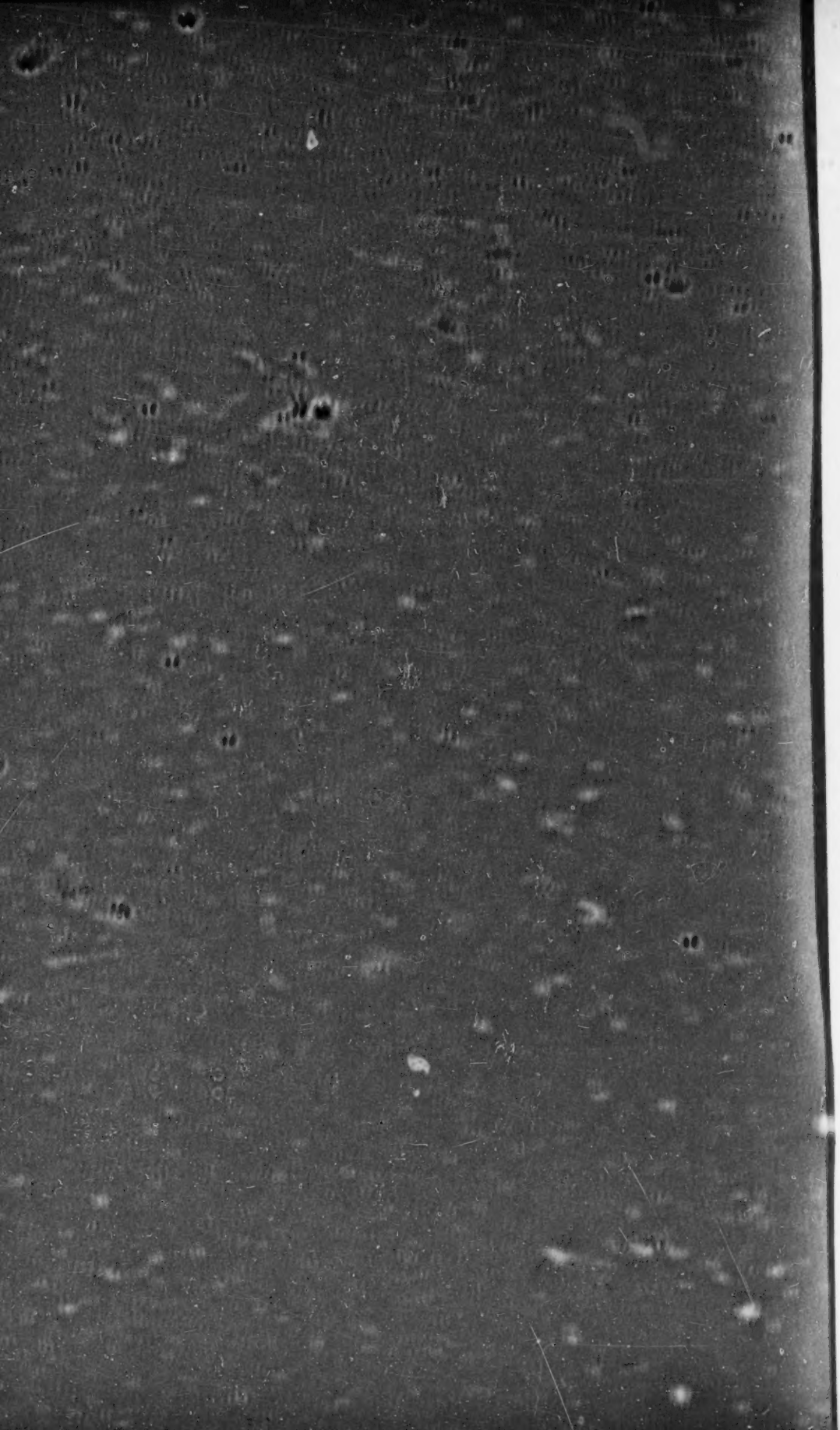

QUESTION PRESENTED FOR REVIEW

The question is whether the District Court was justified by the record in holding on summary judgment motion that First Team Auction, Inc. should have discovered the alleged fraudulent misrepresentation by First State Bank prior to January 9, 1984.

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and The Honorable Associate Justices of the Supreme Court of the United States:

Respondent, FIRST STATE BANK OF CLAY COUNTY, files this brief in opposition to the petition for writ of certiorari herein.

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

A copy of the Order entered in the District Court on January 3, 1986 is attached hereto as Appendix A. A copy of the Order entered in the District Court on January 27, 1986 is attached hereto as Appendix B. A copy

of the Memorandum of Decision entered in the District Court on April 24, 1986 is attached hereto as Appendix C. A copy of the Final Judgment entered in the District Court on April 24, 1986 is attached hereto as Appendix D. This was Case Number *CV 85-H-2383-E* in the United States District Court for the Northern District of Alabama, report of which is not published.

A copy of the opinion in the United States Court of Appeals for the Eleventh Circuit, 808 F.2d 60, dated December 10, 1986, is attached hereto as Appendix E.

JURISDICTION

Jurisdiction of this Court is based on 28 USC § 1254 (1), authorizing review of cases in the courts of appeals by writ of certiorari. The judgment in the court of appeals was entered on December 10, 1986, and the petition for writ of certiorari in this Court was filed on March 7, 1987.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES

This case involves Rule 56 of the *Federal Rules of Civil Procedure*, a copy of which is attached hereto as Appendix F.

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions in the Courts Below.

At the time of the preparation of this brief, the Respondent has not received a copy of an appendix filed in this Court containing the relevant parts of the record in the courts below, except for the two brief excerpts appearing as Appendix C and Appendix D to the petition for writ of certiorari. References in this brief are to the record in the Court of Appeals for the Eleventh Circuit,

except for the orders and judgments entered in the courts below, copies of which are appendices to this brief. Should the citations herein to the record below be insufficient, the Respondent requests permission to refile this brief and to correct these citations on receipt of a copy of an appendix, including the relevant parts of the record below.

The complaint in this case was filed on September 6, 1985 in the United States District Court for the Northern District of Alabama, alleging that in July of 1983 First State Bank fraudulently misrepresented the value of certain real estate, a mortgage on which was sold by First State Bank to First Team Auction, Inc.[1] One of the defenses was that the complaint was barred by the Alabama statute of limitations.[2] The parties and the court below are agreed that the effect of the Alabama statutes is that if First Team Auction, Inc. should have known of any alleged fraud before January 9, 1984, the subject action is barred by the statute of limitations.[3]

On October 2, 1985, First State Bank filed a motion for summary judgment,[4] supported by the affidavit of Ken Vaughan.[5] The trial court held a motion hearing on October 24, 1985, referred to in the Order entered on January 3, 1986,[6] at which time the parties were given additional time for submission of data. The trial court entered an order on January 3, 1986, specifying further time for submission of data.[7] The trial court entered

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[1] R1-1-1 (Court of Appeals).

[2] R1-2-2 (Court of Appeals).

[3] See the first sentence in the third paragraph of the Memorandum of Decision of The Honorable James H. Hancock, United States District Judge, Appendix C hereto. See also Pages 13, 14 and 15 of the Petition for Writ of Certiorari herein.

[4] R1-4-1 (Court of Appeals).

[5] R1-5-1 (Court of Appeals).

[6] Appendix A hereto.

[7] Appendix A hereto.

an order on January 27, 1986, allowing further time for submission of data.[8] On February 14, 1986, First Team Auction, Inc. filed the affidavit of Carlus Gay in opposition to the motion for summary judgment,[9] excerpts from which appear as Appendix C to the petition herein. On February 18, 1986, First Team Auction, Inc. filed the supplemental affidavit of Carlus Gay,[10] excerpts of which appear as Appendix D to the petition herein. These two affidavits constitute all of the evidence submitted on behalf of First Team Auction, Inc. in opposition to First State Bank's motion for summary judgment. In addition to the affidavit submitted with the motion for summary judgment, First State Bank submitted an additional affidavit of Ken Vaughan dated February 14, 1986[11] and submitted an affidavit of Ken Vaughan identifying thirty-two documents attached thereto in support of the motion for summary judgment.[12] On April 24, 1986, the District Court granted summary judgment in favor of First State Bank.[13] This judgment was appealed to the United States Court of Appeals for the Eleventh Circuit, which court affirmed the judgment of the District Court.[14]

B. Statement of Facts.

The facts as summarized by the District Court[15] are fully supported by the record before the District Court.

On July 21, 1983, the parties in the case at bar made a written agreement under which First Team Auction, Inc. agreed to purchase a note and real estate mortgage

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[8] Appendix B hereto.

[9] R1-11-1 (Court of Appeals).

[10] R1-14-1 (Court of Appeals).

[11] R1-13-1 (Court of Appeals).

[12] R1-12-1 (Court of Appeals).

[13] Appendices C and D hereto.

[14] Appendix E hereto.

[15] Appendices B and C hereto.

executed by members of the Hooton family and held by First State Bank. This contract was the subject of prior litigation between these same parties. The judgment in the prior case was settled by agreement of the parties made on December 7, 1983, resulting in the purchase of the subject mortgage by First Team Auction, Inc. from First State Bank.

First Team Auction, Inc. claims that First State Bank made fraudulent misrepresentation as to the value of the subject lands. The agreed issue in the District Court was whether First Team Auction, Inc., with the exercise of reasonable diligence, should have discovered any alleged fraud before January 9, 1984.

First Team Auction, Inc relies entirely on two affidavits of Carlus Gay to create an issue of fact. These affidavits state in general language that First Team Auction, Inc. had little knowledge of the subject lands at the time and did not sell any of the lands on which First State Bank held a mortgage. No response was made to the specific facts presented by First State Bank relative to First Team Auction, Inc. and its Alabama activities during this time, which include the following:

(1) The financial statement of First Team Auction, Inc. as of May 31, 1983, a part of this record,[16] was offered to show the size and nature of the business of First Team Auction, Inc. as it bears on what it knew, or should have known. As of May 31, 1983, it had current assets in excess of $4,000,000, fixed assets in excess of $2,000,000, and total assets in excess of $6,000,000. Liabilities were about $5,000,000 and net worth about $1,000,000. One of the assets of this company was an airplane valued at $225,000. Income for this interim period was 59% from sales and 38% from commissions, indicating that it was in the business of buying and selling lands, as well as selling lands on commission. The income of First Team Auction, Inc. for this interim

[16] R1-5-14 and following (Court of Appeals).

period was over $6,000,000 gross income, $2,000,000 gross profit, and $600,000 net profit.

(2) First Team Auction, Inc. consummated at least four major contracts relative to Hooton lands in Randolph County, Alabama, and neighboring counties during the period from June 21, 1983, to June 27, 1983, before there was any contact between First State Bank and First Team Auction, Inc. These transactions confirm the knowledge of the Hooton lands by First Team Auction, Inc. and its prior commitment to this project. These prior transactions were as follows:

> (a) On June 21, 1983, First Team Auction, Inc. made an agreement with the Carnation Company relative to the liquidation of its claim of $862,000 due from the Hootons, providing for payment of fees to First Team Auction, Inc.[17]
>
> (b) First Team Auction, Inc. purchased the mortgage indebtedness of Citibanc of Alabama/Lineville on June 22, 1983, for some $430,000.[18]
>
> (c) On June 22, 1983, First Team Auction, Inc. made an agreement with Central Soya, relating to the sale of all of the Hooton properties, in which First Team Auction, Inc. guaranteed the payment of the Central Soya balance of about $600,000.[19]
>
> (d) First Team Auction, Inc. contracted with the Hooton Company to sell all of its properties on June 27, 1983.[20]

During this period First Team Auction, Inc. purchased, agreed to purchase, or guaranteed the indebtedness of the Hooton Company to Citibanc and Central Soya. It also made agreements with Carnation relative to the indebted-

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[17] R1-12-1 of Exhibit 5 (Court of Appeals).

[18] R1-12-2 of Exhibit 23 (Court of Appeals).

[19] R1-12-1 of Exhibit 14 (Court of Appeals).

[20] R1-12-1 of Exhibit 7 (Court of Appeals).

ness to it. These agreements with creditors and with the Hooton Company show the full knowledge and involvement of First Team Auction, Inc. in the Hooton lands in Randolph County and neighboring counties in Alabama at the time.

(3) On June 23, 1983, First Team Auction, Inc. made a proposal to Coosa Valley Production Credit Association,[21] in which it stated that it had plans for an auction on the lands on which First State Bank held a lien, and stated plans to build roads and subdivide this lake front property, anticipated to sell for $5,000 to $7,000 per lot. First Team Auction, Inc. also made a proposal to Central Bank of the South,[22] by letter dated July 7, 1983, based upon its plans to auction the lake front property, after subdivision, with roads and other development.

(4) In addition, First Team Auction, Inc. distributed its Announcement of Auction [23] and Buyers Guide,[24] both prepared in or before June of 1983, and prior to the dealings between the parties to the current litigation, in which it appears that First Team Auction, Inc. had detailed knowledge of the various lands in the vicinity of the lands mortgaged to First State Bank, and in fact including a part thereof.

(5) The lake front properties referred to in the case at bar are properties on Harris Lake, developed on the Tallapoosa River by Alabama Power Company. The Announcement of Auction and Buyers Guide, referred to above, include pictures of lands on this lake, and indicate that some of the lands to be sold are adjoining the lake itself. Nothwithstanding the general denial of Carlus Gay that any properties involved in the First State Bank mortgage were sold by his company in July of 1983, the

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[21] R1-12-1 of Exhibit 6; R1-11-13 (Court of Appeals).

[22] R1-12-1 of Exhibit 10 (Court of Appeals).

[23] R1-12-1 of Exhibit 2 (Court of Appeals).

[24] R1-12-1 of Exhibit 3 (Court of Appeals).

Buyers Guide, referred to above, shows Tract R-4 as the Southeast Quarter of the Southwest Quarter of Section 27, Township 19 South, Range 10 East, Randolph County, Alabama. The First State Bank mortgage includes this property. This property was purchased by an agent for First Team Auction, Inc. at the auction conducted by First Team Auction, Inc. on July 23, 1983. The contract for the sale of Tract R-4 (and other tracts) as a result of this sale is a part of the record.

At the July 23, 1983, auction held by First Team Auction, Inc., Tracts R-1 through R-13 were sold to H. O. Byrd for $386,400, and the agreement at the end of the contract recites that First Team Auction, Inc. had purchased these lots through its agent. This is the bulk of the Randolph County lands sold by First Team Auction, Inc. at that time and includes 40 acres of land mortgaged to First State Bank. First Team Auction, Inc. purchased this Tract R-4 for $350 per acre at its sale on July 23, 1983. In fact, it purchased all of the 1,004 acres in Tracts R-1 through R-13 at a price of $350 per acre.

To rebut these facts to create an issue for trial relative to its knowledge of the subject lands, First Team Auction, Inc. relied on two affidavits limited to generality and denial of knowledge.

SUMMARY OF ARGUMENT

The Respondent suggests that this case is not appropriate for review under the considerations governing review on certiorari as stated in Rule 17 of the rules of this Court.

This Court has spoken recently and clearly in the *Celotex* and *Matsushita* cases [25] on the meaning and ef-

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[25] *Celotex Corporation v. Catrett*, Supreme Court of the United States (1986), —— U.S. ——, 106 S.Ct. 2548; *Matsushita Electric Industrial Company, Ltd., et al. v. Zenith Radio Corporation, et al.*,

fect of Rule 56 of the *Federal Rules of Civil Procedure* as applied to the case at bar. There are no conflicts in decisions of the Circuit Courts of Appeal as to this matter.

Under Rule 56(e) of the *Federal Rules of Civil Procedure*, First Team Auction, Inc. had the duty to set forth specific facts showing that there is a genuine issue for trial. In support of its motion for summary judgment, First State Bank presented proof of the size and nature of the business of First Team Auction, Inc., the details of its correspondence and contracts relating to the subject and neighboring lands, and First Team Auction, Inc.'s preparation for, advertising of, and holding of an auction of a part of the subject and neighboring lands. First Team Auction, Inc. failed thereafter to carry its burden under Rule 56 of the *Federal Rules of Civil Procedure* to show a genuine issue for trial. The response of First Team Auction, Inc. was to file two affidavits of Carlus Gay which consisted of general conclusions that First Team Auction, Inc. was not familiar with Alabama lands or the subject lands, relied on the appraisal furnished to it by First State Bank, and did not sell any of the subject lands.

Under the Alabama law, the plaintiff, First Team Auction, Inc., would have the burden of proof at trial to show that it used due diligence in the attempt to discover the alleged fraud within the applicable time period required by § 6-2-3 of the *Code of Alabama*, 1975. The

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Supreme Court of the United States (1986), —— U.S. ——, 106 S.Ct. 1348. See also *Marian Fontenot, etc. v. The Upjohn Company*, United States Court of Appeals, *5th Cir.*, 780 F.2d 1190 (1986); *General GMC Trucks, Inc. v. Mercury Freight Lines, Inc.*, United States Court of Appeals, *11th Cir.*, 704 F.2d 1237 (1983); *Galindo v. Precision American Corporation, et al.*, United States Court of Appeals, *5th Cir.*, 754 F.2d 1212 (1985).

United States Court of Appeals for the Eleventh Circuit held in the case of *Sellers v. A. H. Robins Company, Inc.*,[26] a similar case under the Alabama law, that the Plaintiff has the burden on summary judgment to establish *prima facie* facts that show the Defendant fraudulently prevented the discovery of the wrongful act on which the action is based. The holding of the United States Court of Appeals for the Eleventh Circuit in *Clay v. Equifax, Inc.*[27] is to the same effect. First Team Auction, Inc. failed to offer any evidence on this issue.

Based on the evidence submitted and the record of some 450 pages, the District Court determined that there was no genuine issue as to a material fact, and granted the motion of the Defendant for summary judgment.[28] The facts and the relevant law are stated in the Order entered by the trial court on January 3, 1986,[29] and in the Memorandum of Decision entered by the trial court on April 24, 1986.[30] The judgment of the court below is correct.

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[26] United States Court of Appeals, *11th Cir.*, 715 F.2d 1559 (1983).

[27] United States Court of Appeals, *11th Cir.*, 762 F.2d 952 (1985).

[28] Appendix D hereto.

[29] Appendix A hereto.

[30] Appendix C hereto.

ARGUMENT

I. Considerations Governing Review.

Rule 17 of the rules of this Court indicate the character of reasons that will be considered in the exercise of judicial discretion by this Court on petition for writ of certiorari. We respectfully submit that the case at bar involves no decision by the Court of Appeals for the Eleventh Circuit in conflict with the decision of another federal court of appeals on the same matter, involves no decision of a federal question in a way to conflict with the state court of last resort, and has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court. No question of federal law is involved that has not been settled by this Court, and the decisions below are in accordance with the applicable decisions of this Court.

The judgment of the Court of Appeals for the Eleventh Circuit in the case at bar was a *per curiam* judgment of affirmance, without opinion, of the unpublished decision of the United States District Court for the Northern District of Alabama. The judgment below was in accordance with the decisions of this Court and not in conflict with the decision of another court of appeals, based on a record fully supporting the decision below, in accordance with the accepted and usual course of judicial proceedings.

II. The *Matsushita* and *Celotex* Cases.

Two recent cases in this Court confirm that the issue claimed by First Team Auction, Inc. to be unresolved must be a genuine one and that the non-moving party has the duty to give evidence designating specific facts showing that this is a genuine issue that requires trial.

The case of *Matsushita Electric Industrial Company Ltd., et al. v. Zenith Radio Corporation, et al.*[31] was a suit brought by American manufacturers of television sets against Japanese manufacturers, alleging violations of the Sherman Act. The District Court granted summary judgment in favor of the defendants, and the Court of Appeals reversed. This Court, speaking through Mr. Justice Powell, reversed the Court of Appeals. Mr. Justice Powell in effect said that all of the theories of the plaintiffs simply made no economic sense. The court reexamined the principles that govern the summary judgment determination. Mr. Justice Powell said that to survive defendant's motion for summary judgment plaintiffs must establish that there is a genuine issue of a material fact. He then said:

> Second, the issue of fact must be "genuine." Fed. Rule Civ.Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. [Citations omitted.] In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed.Rule Civ.Proc. 56(e), 28 U.S.C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service, supra,* 391 U.S., at 289, 88 S.Ct., at 1592.[32]

Justice White, speaking for four justices, said:

> The Court's initial discussion of summary judgment standards appears consistent with settled doctrine.

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[31] —— U.S. ——, 106 S.Ct. 1348 (1986).

[32] —— U.S. at ——, 106 S.Ct. at 1356.

> I agree that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Ante*, at 1356 (quoting *Cities Service*, *supra*, 391 U.S., at 289, 88 S.Ct., at 1592).[33]

The case of *Celotex Corporation v. Catrett*[34] was a suit claiming wrongful death from exposure to asbestos products. The district court granted summary judgment in favor of the defendant, and the Court of Appeals reversed. This Court reversed the Court of Appeals. Mr. Justice Rehnquist, speaking for this Court, said:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[35]

Mr. Justice Rehnquist also said:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."[36]

In *Matsushita*, this Court emphasizes that opposition to summary judgment must be based on a theory that makes sense, not just a "metaphysical doubt."

In *Celotex*, this Court emphasizes that the plaintiff, in opposition to a motion for summary judgment, has the burden to establish the essential elements of its case through the use of the evidentiary materials listed in

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[33] —— U.S. at ——, 106 S.Ct. at 1363.

[34] —— U.S. ——, 106 S.Ct. 2548 (1986).

[35] —— U.S. ——, 106 S.Ct. at 2552.

[36] —— U.S. at ——, 106 S.Ct. at 2555.

Rule 56(c) of *Federal Rules of Civil Procedure.* In the case at bar, First Team Auction, Inc. has not done so.

The decision of the court below in the case at bar is in conformity with the decisions of this Court. No other court of appeals has rendered any conflicting decision.

III. Duty to set forth specific facts in opposition to motion for summary judgment.

Rule 56 of the *Federal Rules of Civil Procedure* states the duty to set forth specific facts in opposition to a motion for summary judgment. In the case of *Vidrine v. Enger,*[37] a case claiming medical malpractice, the plaintiff testified that another doctor was of the opinion that the defendant had committed malpractice, with specifics about the opinion of the other doctor. The court said:

> The Magistrate was correct in refusing to consider this answer as "evidence" sufficient to defeat the Rule 56 motion for summary judgment.
>
> Rule 56(e) states in part:
>
> > When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
>
> Vidrine presented no affidavit or deposition from Dr. Rein or any other physician. His quotation of Dr. Rein is pure hearsay. We have repeatedly held that,

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[37] United States Court of Appeals, *5th Cir.*, 752 F.2d 107 (1984). See also *Wimberly vs. Clark Controller Company,* United States Court of Appeals, *6th Cir.*, 364 F.2d 225 (1966); *Sires vs. Luke,* United States District Court, Southern District of Georgia, 544 F.Supp. 1155 (1982).

> while notice pleading is sufficient to open the federal courthouse door, a party opposing a motion for summary judgment, properly put, may not ask the court to try the case in order to determine the facts but must set forth by affidavit or deposition specific facts that would justify judgment in his favor if proved.[38]

In the case of *Martz v. Union Labor Life Insurance Company*,[39] Judge Wood, speaking for the court, said:

> It bears repeating that the purpose of summary judgment is to determine whether there is any genuine issue of material fact in dispute and, if not, to render judgment in accordance with the law as applied to the established facts. The facts must be established through one of the vehicles designed to ensure reliability and veracity—depositions, answers to interrogatories, admissions and affidavits. When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence.[40]

Rule 56(e)[41] was amended in 1963 to include the two sentences at the end that are quoted above. The purpose of the 1963 amendment was to overrule decisions in one circuit that well-pleaded claims and defenses were invulnerable to attack by a motion for summary judgment.[42]

In the case of *Securities and Exchange Commission v. Research Automation Corporation*,[43] Chief Judge Kaufman said:

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[38] 752 F.2d at 110.

[39] United States Court of Appeals, *7th Cir.*, 757 F.2d 135 (1985). See also *McSpadden v. Mullins*, United States Court of Appeals, *8th Cir.*, 456 F.2d 428 (1972); *General GMC Trucks, Inc. v. Mercury Freight Lines, Inc.*, United States Court of Appeals, *11th Cir.*, 704 F.2d 1237 (1983).

[40] 757 F.2d at 138.

[41] *Federal Rules of Civil Procedure.*

[42] See *Federal Practice and Procedure*, Wright, Miller & Kane, Volume 10A, Page 112.

[43] United States Court of Appeals, *2nd Cir.*, 585 F.2d 31 (1978).

> Indeed, the policy favoring efficient resolution of disputes, which is the cornerstone of the summary judgment procedure, would be completely undermined if unsubstantiated assertions were sufficient to compel a trial.[44]

Chief Justice Kaufman stated that the defendant was given three extensions of time to respond, and one affidavit was submitted that failed to contradict the charges with any specificity. In the case at bar, the trial judge made a statement from the bench on October 24, 1985, calling for the submission of data,[45] entered an order on January 3, 1986, providing additional time for submission of data,[46] and entered a scheduling order on January 27, 1986.[47] First Team Auction, Inc. failed to contradict the specific facts shown by First State Bank.

In the case of *General Business Systems v. North American Philips Corporation*,[48] Judge Sneed, speaking for the court, said:

> A party opposing summary judgment must present some "significant probative evidence tending to support the complaint." (Citations omitted.) Such evidence must be relevant to disputed factual issues that are truly material to the litigation.[49]

In the case of *Miller v. Solem*,[50] Judge Gibson, speaking for the court, said:

> However, a party opposing a motion for summary judgment is not without obligations. Rule 56(e) states that "when a motion for summary judgment

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[44] 585 F.2d at 33.

[45] R1-8-1 (Court of Appeals).

[46] R1-8-1 (Court of Appeals).

[47] R1-10-1 (Court of Appeals).

[48] United States Court of Appeals, *9th Cir.*, 699 F.2d 965 (1983).

[49] 699 F.2d at 971.

[50] United States Court of Appeals, *8th Cir.*, 728 F.2d 1020 (1984).

> is made and supported as provided in this rule, an adverse party may not rest on mere allegations or denials of his pleadings, but his response, by affidavit or otherwise provided in this rule, must set forth specific facts that there is a genuine issue for trial." And, nonmovants' affidavits must conform to Rule 56 (e) which states in pertinent part:
>
> > Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to all matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.
>
> Finally, conclusive assertions of ultimate fact are entitled to little weight when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion supported by complying affidavits. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2727 at pp. 157-59 (1983); cf. *Cummings v. Roberts*, 628 F.2d at 1069.[51]

The same conclusion was reached in the case of *Russell v. Harrison*,[52] in which Judge Williams, speaking for the court, said:

> While the court must draw all inferences in favor of the party opposing summary judgment, a plaintiff cannot establish a genuine issue of material fact by resting on the mere allegations of its pleadings. On the contrary, "once defendants have made . . . sworn denials, summary judgment is appropriate unless plaintiff can produce *significant evidence* demonstrating the existence of a genuine fact issue." *Parsons v. Ford Motor Co.*, 669 F.2d 308, 313 (5th Cir.), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed2d

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[51] 728 F.2d at 1023, 1024.

[52] United States Court of Appeals, *5th Cir.*, 736 F.2d 283 (1984).

72 (1982) (emphasis added). (Emphasis added in the original.)[53]

In the case of *R. G. Group, Inc. v. The Horn and Hardart Company*,[54] Judge Pratt, speaking for the court, said:

> With the evidence on these factors so overwhelmingly in favor of one position, and since pretrial discovery provided nothing to contradict that evidence, there is no question but that the district court acted properly in granting summary judgment for the defendants. Summary judgment is called for when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In deciding a summary judgment motion the court "cannot *try* issues of fact, but can only determine whether there *are* issues of fact to be tried." [Citations omitted.] While doubts must be resolved in favor of the party opposing the motion, the opposing party must provide "concrete particulars" showing that a trial is needed, and "[i]t is not sufficient merely to assert a conclusion without supplying supporting arguments or facts in opposition to that motion." *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). If after pretrial discovery the court is "convinced as a matter of law that the suit can have only one possible outcome", summary judgment must be granted.[55]

In the case of *Galindo v. Precision American Corporation*,[56] the issue considered by the court was whether defendant was "engaged in the business of selling" certain sawmill equipment. Defendant filed an affidavit that it was not so engaged, and summary judgment was entered for it. Judge Randall, speaking for the court, said:

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[53] 736 F.2d at 287.

[54] United States Court of Appeals, *2nd Cir.*, 751 F.2d 69 (1984).

[55] 751 F.2d at 77.

[56] United States Court of Appeals, *5th Cir.*, 754 F.2d 1212 (1985).

> In fact, unsupported allegations or affidavits setting forth "ultimate or conclusory facts and conclusions of law" are insufficient to either support or defeat a motion for summary judgment.[57]

In response to the evidence presented by First State Bank, First Team Auction, Inc. submitted to the court nothing but the conclusory affidavits of Mr. Gay that he knew nothing and did nothing. These affidavits fall short of the standard required by Rule 56 of the *Federal Rules of Civil Procedure.*

IV. Burden on plaintiff to show due diligence to discover alleged fraud.

The Alabama law on the duty to use diligence to discover fraud has been considered by the Alabama courts and by the United States Court of Appeals for the Eleventh Circuit, including the recent case of *Sellers v. A. H. Robins Co., Inc.*[58] In the *Sellers* case, in 1973, plaintiff's doctor prescribed for her use a Dalkon Shield to prevent pregnancy. In 1973 plaintiff became pregnant and suffered gynecological problems, resulting in an abortion, a hysterectomy, and other difficulties. In 1980 plaintiff read a newspaper article stating the fact that the Dalkon Shield had allegedly caused serious injury to thousands of women. Suit was filed in 1981. The Court said:

> On the fraud claim, the district court stated that *Alabama Code* section 6-2-3 only suspends the running of the statute of limitations until a plaintiff of due diligence discovers or should have discovered his injury. The district court held that Carol Sellers should have known in 1973 of the casual connection

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[57] 754 F.2d at 1216; the court cites Wright, Miller & Kane *Federal Practice and Procedure,* § 2738 (1983); see also *Lew v. Kona Hospital,* United States Court of Appeals, *9th Cir.,* 754 F.2d 1420 (1985).

[58] United States Court of Appeals, *11th Cir.,* 715 F.2d 1559 (1983).

between her medical injuries and the insertion of the Dalkon Shield. The district court granted the motion for summary judgment.

The sole issue is whether the trial court erred in granting Robins's summary judgment motion by holding that plaintiffs' claims were barred by the relevant statutes of limitations, and that defendant's actions did not constitute fraudulent concealment sufficient to toll the statute.

The relevant Alabama statute states that:

> In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year in which to prosecute his action.

Ala. Code § 6-2-3 (1975). Although this statute speaks of actions based on fraud, the Alabama Supreme Court in *Tonsmeire v. Tonsmeire*, 285 Ala. 454, 233 So.2d 465 (1970), stated the following:

> While the above code section speaks of "actions seeking relief on the grounds of fraud," it has been applied to other torts not arising in fraud in appropriate cases, and applies to a fraudulent concealment of the existence of a cause of action. *Hudson v. Moore*, 239 Ala. 130, 194 So. 147.

233 So.2d at 467. In Alabama, the expiration of a limitation period is tolled only until the plaintiff discovers, or should have discovered through the exercise of due diligence, his cause of action. (Citations omitted.)

A plaintiff using section 6-2-3 to toll the statute of limitations bears the burden of proving fraudulent concealment. See *Mann v. Adams Realty Co.*, 556 F.2d 288, 294 n. 7 (5th Cir.1977); *Amason v. First State Bank*, 369 So.2d 547 (Ala. 1979). A plaintiff using the tolling statute must allege, or on summary judgment establish, prima facie facts which show

> that the defendant fraudulently prevented discovery of the wrongful act on which the action is based. (Citations omitted.)[59]

In the *Sellers* case, the Court quoted, with approval, from the opinion of the Ninth Circuit in *Sidney-Vinstein v. A. H. Robins Co.*, 697 F.2d 880, 884, as follows:

> In the absence of fraudulent concealment it is plaintiff's burden, within the statutory period, to determine whether and whom to sue. Once a plaintiff knows that harm has been done to him he must . . . determine within the period of limitations whether to sue or not, which is precisely the decision that other tort plaintiffs must make. . . . [F]ailure of the [defendant] to ascertain and publish the fact of its negligence is hardly sufficient to constitute fraudulent concealment.[60]

In the *Sellers* case, the Court also commented on the interpretation of this statute by the Alabama court, as follows:

> The Alabama Supreme Court reached the same conclusion in *Tonsmeire v. Tonsmeire*, 285 Ala. 454, 233 So.2d 465 (1970), where the court said:
>
> > In the absence of a confidential relationship, we know of no duty imposed by law obligating an alleged tort feasor to make known to one possibly injured by his acts the existence of a possible cause of action.
> >
> > . . . .
> >
> > To establish fraud by silence, facts should be averred from which a duty to speak arises—it should appear that the parties were not dealing at arms length. *Williams v. Bedenbaugh*, 215 Ala. 200, 110 So. 286; *Maloney v. Fulenwider*, 213 Ala. 205, 104 So. 396.
>
> 233 So.2d at 468.[61]

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[59] 715 F.2d at 1560, 1561.

[60] 715 F.2d at 1562.

[61] 715 F.2d at 1562.

The case of *Clay v. Equifax, Inc.*[62] also involved § 6-2-3 of the *Alabama Code*, 1975. Judge Thornberry, speaking for the Court, said:

> Since the latest possible publication in this case, the 1981 mailing, occurred more than one year prior to Clay filing suit, Clay must rely on the section 6-2-3 fraudulent concealment theory to bring his action within the one-year statute. Moreover, "[a] plaintiff using section 6-2-3 to toll the statute of limitations bears the burden of proving fraudulent concealment. [citations] A plaintiff using the tolling statute must allege, *or on summary judgment establish*, prima facie facts which show that the defendant fraudulently prevented discovery of the wrongful act upon which the action is based." *Sellers v. A. H. Robins Co., Inc.*, 715 F.2d 1559 (11th Cir.1983) (emphasis ours). Clay, however, failed to establish facts which would show that the defendants fraudulently concealed the reports, and, therefore, did not meet his burden at summary judgment.[63]

In the case of *Hunt v. American Bank and Trust Company of Baton Rouge, Louisiana*,[64] the Court again considered the Alabama one-year statute of limitations for fraud and the discovery period. The question, as in the case at bar, was when the plaintiff, in the exercise of due diligence, should have discovered the alleged fraud. In *Hunt*, the Court concluded, as a matter of law, that the plaintiff should have been able to turn up information from his own files during a four-month period. The Court confirmed the test to be what in the course of due diligence should have been known.

We submit that under the applicable Alabama law First Team Auction, Inc. had the duty to show diligence

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[62] United States Court of Appeals, *11th Cir.*, 762 F.2d 952 (1985).

[63] 762 F.2d at 961.

[64] United States Court of Appeals, *11th Cir.*, 783 F.2d 1011 (1986).

to discover the alleged fraud, but failed to offer any evidence with regard thereto.

V. Summary.

The case at bar is not appropriate for review under the considerations governing such review as contained in Rule 17 of the rules of this Court.

Within the last year this Court has clearly stated the applicable rules governing response to a motion for summary judgment, including the opinions in the *Matsushita* and *Celotex* cases, discussed above. The decision of the court below in the case at bar is in accordance with the decisions of this Court and not in conflict with decisions of another federal court of appeals.

In view of the record in the case at bar as established by First State Bank, First Team Auction, Inc. had the duty under Rule 56(e) of the *Federal Rules of Civil Procedure* to set forth specific facts and not rest on a general denial. For example, the affidavit of Carlus Gay that his July 1983 auction included none of the land mortgaged to First State Bank (see Appendix C to the petition for writ of certiorari herein) does not respond to the specific contract, a part of the record herein, in which First Team Auction, Inc. sold a portion of the lands on which First State Bank had a mortgage in July 1983, and, in fact, purchased this land through its agent at that sale. First Team Auction, Inc. had a duty to make specific response to this specific statement.

Under the applicable Alabama statute relative to claimed concealment of fraud, the burden is on the plaintiff, on summary judgment, to establish facts showing diligence on its part to discover the alleged fraud. First Team Auction, Inc. offered no such evidence.

The trial court correctly granted summary judgment, the governing law and facts being set out in its Order

and Memorandum of Decision. The Court of Appeals for the Eleventh Circuit correctly affirmed that judgment.

CONCLUSION

First State Bank respectfully submits that the judgments of the courts below are correct, and that the petition for writ of certiorari to this Court is due to be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CV85-H-2383-E

FIRST TEAM AUCTION, INC.,
Plaintiff,

vs.

FIRST STATE BANK OF CLAY COUNTY
(FORMERLY FIRST STATE BANK OF LINEVILLE), *et al.*,
Defendants.

[Filed Jan. 3, 1986]

ORDER

This cause came on for consideration at a scheduled motion docket held in Anniston, Alabama, on October 24, 1985, at which time the court heard oral argument on pending motions for summary judgment filed by defendant First State Bank of Clay County (formerly First State Bank of Lineville; herein referred to as the "Bank") and by defendants Realty Researchers, a partnership, and Gene Dilmore and Gary Dilmore, individually and as partners doing business as Realty Researchers (said defendants collectively referred to herein as "Realty Researchers"). At the motion docket, the court granted plaintiff two weeks to file any supplemental materials it wished to submit, with all defendants having one week thereafter to respond to any such submissions.

The court has considered all materials so submitted, including the unsigned copy of an affidavit of Carlus D. Gay, Jr. (No executed copy of the Gay affidavit was ever filed with the court; however, the court has considered the statements in the copy of the affidavit as if a signed copy had been filed.)

In order to rule on the pending motions, it is necessary to rehearse at some length the factual background of this case. In July of 1983, a family known as the Hootons owed the Bank approximately $361,884.73 plus interest on a debt secured by a mortgage on certain real estate (the "mortgaged land"). Owing to the Hootons' breach of certain obligations, the Bank was empowered to foreclose the mortgage after July 1, 1983.

Sometime prior to July 1983, the Hootons had engaged plaintiff to sell various pieces of property for them, including the mortgaged land. Plaintiff planned to sell some of this property, not including the mortgaged land, at auction on July 23, 1983, and a promotional brochure which included photographs of some of the property to be sold at the auction, as well as photographs of some of the mortgaged land, was circulated by plaintiff before that date. Plaintiff planned to sell the mortgaged land in the spring of 1984.

On July 5, 1983, plaintiff and the Bank began negotiations aimed at avoiding foreclosure by the Bank on the Hooton mortgage. These negotiations culminated in an agreement executed on July 21, 1983, whereby plaintiff agreed to purchase the Hooton mortgage from the Bank for the amount due on the debt, payable on or before August 25, 1983. Before or at the time of the agreement, the Bank gave plaintiff various documents related to the mortgage, including an appraisal on the mortgaged land prepared by Realty Researchers. This appraisal, which had been commissioned by the Hootons, valued the mortgaged land at over $1,100,000. The Bank had allegedly informed the Hootons at the time it took

the mortgage that the mortgaged land would have to be appraised at $1,000,000 or more, or the Hootons would have to provide further security on their debt to the Bank. The Hootons procured and paid for the appraisal themselves; i.e., neither the Bank nor plaintiff was in privity of contract with Realty Researchers.

Despite the July 21 agreement, plaintiff refused to purchase the mortgage on the agreed August 25 closing date. The Bank thereupon sued plaintiff for breach of its agreement, and this court granted summary judgment in the Bank's favor on November 18, 1983. *First State Bank of Lineville v. First Team Auction, Inc.*, No. CV83-H-2059-E (N.D.Ala. Nov. 18, 1983).

On or about December 7, 1983, plaintiff agreed to forego appeal in CV83-H-2059-E in exchange for the Bank's promise to stay execution of the judgment in that case until March 18, 1984.

The mortgaged land was not sold by plaintiff until August of 1984. The court file does not reflect the amount received for the land at that auction.

Plaintiff filed this action on September 6, 1985. Plaintiff claims to have been defrauded by the Bank and Realty Researchers, alleging that the appraisal that Realty Researchers performed on the mortgaged land was a "sweetheart appraisal" and that both Realty Researchers and the Bank knew that the appraised value of the mortgaged land far exceeded its actual value. Specifically, plaintiff claims that the Bank defrauded it by giving it the Realty Researchers appraisal, when the Bank allgedly knew that the appraisal was false, and intended plaintiff to rely on it when plaintiff agreed to purchase the mortgage from the Bank. Plaintiff then claims that Realty Researchers is liable to it because Realty Researchers allegedly knew its appraisal was false and that someone in plaintiff's position would rely on the appraisal.

Both the Bank and the Realty Researchers defendants have moved for summary judgment. The Bank raises several grounds for its motion: (1) that this action is barred by the one-year statute of limitations, Ala. Code § 6-2-39(a)(5) (1975); (2) that plaintiff's claim here should have been brought as a compulsory counterclaim in CV83-H-2059-E, and is now barred under Rule 13(a), FRCP; (3) that plaintiff is a foreign corporation not qualified to do business in Alabama, that plaintiff's action, although sounding in tort, depends upon the contract between plaintiff and the Bank, and so that plaintiff is barred from bringing this action under Ala. Code § 10-2A-247 (1975); and (4) that the December 7, 1983 agreement between plaintiff and the Bank constituted an accord and satisfaction settling all controversies between those parties, including the present claim. At oral argument, counsel for the Bank conceded that any such accord and satisfaction did not resolve the present controversy, but at best would have the effect of setting an outer limit on the time when plaintiff knew or should have known the facts giving rising to this action.

The Realty Researchers defendants have adopted the Bank's arguments in support of their motions for summary judgment. However, it is not necessary to reach those arguments in order to address Realty Researchers' motion. The undisputed facts clearly show that the Hootons obtained the appraisal from Realty Researchers in order to comply with the Bank's demands for sufficient security for the loan made to the Hootons. Plaintiff was not in privity of contract with Realty Researchers. The undisputed facts reflect that Realty Researchers owed plaintiff no duty, the breach of which would give rise to an action in tort or for breach of contract. Accordingly, the court will by separate order grant judgment in favor of the Realty Researchers defendants on all claims. This judgment will be certified as a final judgment under Rule 54(b), FRCP.

The Bank claims it is entitled to summary judgment in its favor because plaintiff is a foreign corporation not qualified to do business in Alabama and thus barred from bringing suit on its contract with the Bank by Ala. Code § 10-2A-247 (1975). The Bank is correct that plaintiff cannot evade this statute by making what is actually a suit on the contract sound as an action in tort. However, this case seems squarely within the rule of *Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So.2d 809, 813 (Ala. 1980), that "a claim for fraud lies independent of the creation of a valid contract," so that § 10-2A-247 does not bar a suit by a foreign corporation alleging fraud in the inducement or creation of a contract, even where the corporation cannot enforce the contract itself. Therefore, the Bank's motion for summary judgment on the ground that plaintiff is not qualified to do business in Alabama is DENIED.

The Bank's remaining grounds for its motion—the statute of limitations and failure to bring a compulsory counterclaim—are more troublesome. The present state of the record leaves it unclear as to when it may fairly be said that plaintiff should have known of facts which, if followed up, would have led it to discover the alleged fraud. While the court is somewhat inclined to say that plaintiff should have known such facts in time to have brought its present claim as a compulsory counterclaim in CV83-H-2059-E, or to have caused the statute of limitations to begin to run before the end of 1983, the present record is deficient in the development of facts which would tend to confirm or deny that inclination—e.g., the extent of plaintiff's activities during the summer and autumn of 1983 with regard to the mortgaged land and the related property sold in July of 1983.

Further, the parties have assumed that the one-year statute of limitations set out in Ala. Code § 6-2-39(a)(5) (1975) governs this action. However, effective January

9, 1985, § 6-2-39 was repealed and actions of this sort became governed by the two-year statute set out in Ala. Code § 6-2-38(1) (Supp. 1985). *See* Act No. 85-39, 1984-85 Ala. Acts (2d Special Sess.) 40. Assuming for the moment that the statute did not begin to run against the plaintiff until January 9, 1984, or thereafter, the court is not prepared to rule whether the one-year or two-year statute should be applied without giving counsel the opportunity to brief the issue.

The court will hold the Bank's motion for summary judgment on the statute of limitations and compulsory counterclaim grounds in abeyance, and will deem that motion resubmitted 45 days from the date of this order. Upon such resubmission, the court will be primarily concerned with three issues:

1. The court will consider whether the one-year or two-year statute of limitations should apply to this action, both in light of any further evidence as to when plaintiff should have known of the alleged fraud and in light of any relevant arguments dealing with the proper construction and application of the old and new statutes.

2. The court will contemplate granting a partial summary judgment in favor of the Bank on any claim that its alleged fraud would entitle plaintiff to punitive damages, unless the plaintiff produces verified facts tending to show the elements necessary to support a fraud claim which can serve as the basis for an award of punitive damages. Stated another way, there is simply no evidence before the court at this time which would arguably support a claim that the acts of the Bank were malicious, oppressive or gross.

3. In the event that the court determines that punitive damages will not be available, the court will examine the record to determine whether it supports any claim by the plaintiff for actual damages. The court record does not now reflect the price paid for the mortgaged land at the August 1984 sale. If that sale brought plain-

tiff enough to cover the amount it paid the Bank for the note and mortgage, the court is concerned that plaintiff may not have suffered the actual damages required to support its claim of fraud.

During the 45-day period before the motion is deemed resubmitted, the parties may submit to the court any verified material or briefs relevant to the motion, and the court in particular encourages the parties to address the above three issues.

DONE this 3rd day of January, 1986.

/s/ James H. Hancock
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CV85-H-2383-E

FIRST TEAM AUCTION,
Plaintiff,

vs.

FIRST STATE BANK OF LINEVILLE,
Defendant.

[Filed Jan. 27, 1986]

NOTICE TO ALL ATTORNEYS AND PARTIES

Pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, the court contemplates causing the following time limits to apply to this case. If an attorney or party has any objection to, or suggested modification of the indicated schedule, he or she should file a notice within 15 days from the date hereof with the clerk of court setting forth such objection or suggestion. If no such notice is filed, the following time limits apply to this case:

1. The parties to the litigation and the issues embraced in the litigation shall be as reflected by the pleadings on file 150 days after the action was commenced.

2. All discovery must be commenced in time to be completed by the date of the pre-trial conference. The parties should not assume that there will be more than 180 days between the date the action was commenced and the date of the pre-trial conference.

3. All motions must be filed promptly after movant becomes aware of facts indicating the need to file a motion.

DONE this 27th day of January, 1986.

/s/ James H. Hancock
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CV85-H-2383-E

FIRST TEAM AUCTION, INC.,
Plaintiff,

vs.

FIRST STATE BANK OF CLAY COUNTY,
Defendant.

[Filed Apr. 24, 1986]

MEMORANDUM OF DECISION

This cause is before the court on the motion of defendant for summary judgment in its favor on the complaint. The factual background of this case is presented in the court's order entered January 3, 1986, and will not be reiterated in detail here.

This action arises out of a transaction between plaintiff and defendant culminating in an agreement executed July 21, 1983. On September 6, 1985, plaintiff filed this suit, claiming to have been defrauded by defendant in the July 1983 transaction. Defendant's main asserted ground for summary judgment is that plaintiff's claim herein is time barred.

Three Alabama statutes are relevant here. Before 1985, fraud claims in Alabama were governed by the

one-year statute of limitations in Ala. Code § 6-2-39(a)(5) (1975) (repealed by Act No. 85-39, 1984-85 Ala. Acts (2nd Special Sess.) 40). Effective January 9, 1985, such claims fall under the two-year statute prescribed by Ala. Code § 6-2-38(1) (Supp. 1985). The final statute that is critical here is Ala. Code § 6-2-3 (1975 and Supp. 1985), which tolls the statute of limitations on a fraud claim until such time as the plaintiff should with reasonable diligence have discovered the fraud. (Before January 9, 1985, a party plaintiff had one year from the date the fraud should have been discovered to bring suit. Act No. 85-39, supra, extended that time to two years, effective January 9, 1985).

The parties are in agreement that plaintiff gains the benefit of the two-year statute if it could not with reasonable diligence have discovered its fraud claim before January 9, 1984. *See Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263, 268-69 (Ala. 1981) (legislature may extend limitations period for existing claim, so long as claim was not already time barred at the time of the legislative action). Thus, the crucial inquiry here is whether plaintiff's alleged fraud claim arose before January 9, 1984. If it arose before that date, it would have been time barred under § 6-2-39(a)(5) well before this suit was filed. If it arose on or after that date, plaintiff gained the benefit of § 6-2-38(1) and the amended § 6-2-3 and obtained an extra year in which to file suit.

As an initial proposition, it must be noted that, but for § 6-2-3, plaintiff's claim would have arisen in July 1983, the time of the alleged fraud, and thus would have been time barred over a year before this suit was filed. The burden is on plaintiff to show that it should not have discovered defendant's alleged fraud until such time as to make the filing of suit timely under § 6-2-3. *See Amason v. First State Bank*, 369 So.2d 547, 550 (Ala. 1979). In order to prove the applicability of § 6-2-3, plaintiff must show not merely that it was ignorant of the facts underlying the alleged fraud, but rather that

its ignorance was "superinduced by the fraud of the [defendant] in the form of active concealment, conduct calculated to mislead, or to prevent inquiry and lull into repose." *Peters Mineral Land Co. v. Hooper*, 208 Ala. 324, 329, 94 So. 606 (1922). Of course, the statute begins to run notwithstanding § 6-2-3 from the time the alleged fraud should have been discovered, not from the time of actual discovery. *Johnson v. Shenandoah Life Insurance Co.*, 291 Ala. 389, 397, 281 So.2d 636 (1973).

Here, the undisputed facts show that plaintiff bought mortgages from defendant in July 1983. It planned to sell the lands covered by those mortgages (the "mortgaged lands") in the spring of 1984, after selling other lands owned by the mortgagor in July 1983. The auction of the bulk of the mortgaged lands actually took place in August 1984, after a lawsuit wherein defendant here sought and obtained specific performance of plaintiff's agreement to buy the mortgages, which lawsuit was resolved in December 1983, and after protracted negotiations in the Bankruptcy Court for this district over the release of the mortgaged lands from the estate of the bankrupt mortgagor. At the August 1984 auction, the mortgaged lands brought in an amount considerably less than their appraised value under the appraisal plaintiff now says was fraudulent. Further, it appears that plaintiff had sold some 40 acres of the mortgaged lands as part of Tract R-4 in the July 1983 auction. This tract, along with other tracts adjoining some of the mortgaged lands, sold at auction for $350 per acre, again apparently less than the appraised value on which plaintiff purportedly relied. The purchaser of Tract R-4 was, in fact, the agent of plaintiff.

To judge from its financial statements and its activities, as reflected by the court record, plaintiff is a sophisticated corporation with considerable experience in the purchase, sale and development of real estate. Plaintiff had had its representatives on the mortgaged lands by

July 1983, at least to the extent necessary to include photographs and information on the mortgaged lands in promotional materials for the July 1983 auction and to sell (and indirectly purchase) Tract R-4 in the July 1983 auction. Plaintiff was engaged in litigation over its contract to buy the mortgages throughout the fall of 1983. Nonetheless, plaintiff says it could not have discovered the alleged fraud in 1983, nor even after the August 1984 auction. Rather, it maintains that it discovered the alleged fraud only after contact with the mortgagor in May 1985.

This argument will not hold water. Of course, it is only important whether plaintiff should have discovered the alleged fraud before January 9, 1984, not whether its actual discovery did not occur before May 1985. On this point, the court must reiterate that plaintiff is a sophisticated corporation claiming to have been defrauded in a transaction of the kind in which it regularly engages, not a naive individual of whom an overbearing entity has taken advantage.

While disputes as to when a party plaintiff should have known of a fraud may ordinarily be left to the jury, it is clear that in some circumstances there may be no genuine dispute in light of the identities and activities of the parties, so that the matter may be resolved in a defendant's favor without trial. *See e.g., Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1014 (11th Cir. 1986). Further, it is settled that § 6-2-3 does not relieve a party plaintiff of diligence in the discovery of fraud, but rather that it requires that fraudulent concealment of the existence of the fraud be pled and proven. *Sellers v. A. H. Robins Co.*, 715 F.2d 1559, 1561-62 (11th Cir. 1983).

The present case appears to be squarely within the rule of *Taylor v. South & North Alabama Railroad Co.*, 13 F. 152, 159 (C.C.M.D.Ala. 1882), holding that a predecessor statute to § 6-2-3.

> . . . certainly does not absolve a party from all effort or diligence to obtain knowledge of the facts constituting the fraud complained of. The statute certainly was not intended [to] and did not change the rule of equity upon the subject of diligence in such cases, and thus benefit those only who might be willfully ignorant, or who, from carelessness and indifference, should neglect to avail themselves of the means of information on the subject.
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> * * *
>
> . . . There must, then, be some disposition and effort to obtain a knowledge of the facts, and that is what the law calls reasonable diligence. The question is not what facts the complainant actually knew, but of what facts might he have obtained knowledge had he sought it from the natural sources of information which were at his command.

Here, plaintiff was experienced in real estate matters. For the latter half of 1983 it was engaged in negotiations and litigation regarding the mortgaged land. The mortgaged land was in its control from July 1983 on, and in July 1983 it auctioned off and bought for its own account 40 acres of the mortgaged land. Plaintiff had ample access to information it needed to discover the alleged fraud, and ample time and reason to use that information. Its failure to do so shows that it lacked the diligence required to claim the benefit of § 6-2-3.

On this record, it is apparent as a matter of law that plaintiff should have known of defendant's alleged fraud before January 9, 1984, and thus that this action became time barred before January 9, 1985. Accordingly, defendant's motion for summary judgment in its favor will be granted, and a separate order dismissing the complaint with prejudice will be entered.

DONE this 24th day of April, 1986.

/s/ James H. Hancock
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CV85-H-2383-E

FIRST TEAM AUCTION, INC.,
Plaintiff,

vs.

FIRST STATE BANK OF CLAY COUNTY,
Defendant.

[Filed Apr. 24, 1986]

FINAL JUDGMENT

In accordance with the Memorandum of Decision, this day entered, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment in its favor on the complaint is GRANTED, and this action is DISMISSED with prejudice. Costs are taxed against plaintiff.

DONE this 24th day of April, 1986.

/s/ James H. Hancock
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7371

FIRST TEAM AUCTION, ETC.,
Plaintiff-Appellant,

versus

FIRST STATE BANK OF LINEVILLE, ETC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(December 10, 1986)

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH *, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX F

SUMMARY JUDGMENT

Rule 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.